United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7403

United States Court of Appeals
For the Second Circuit

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P/S

LEROY PORSS,

Plaintiff-Appellee,

-against-

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT MARITIME OVERSEAS CORPORATION

WALKER & CORSA
Attorneys for Defendant-Appellant
25 Broad Street
New York, N.Y. 10004
(212) 344-4700

JOSEPH T. STEARNS
Of Counsel

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel (212) 447-5358

3

TABLE OF CONTENTS

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DEFENDANT-APPELLANT'S REPLY BRIEF

I

To answer plaintiff-appellee's brief regarding the alleged sufficiency of proof supporting the verdict in his favor, it is important to observe that plaintiff claimed a negligent failure on the part of his co-workers, Frank Wherrity and George Schmidt, to properly carry out the removal of the hose and butterworth machine and that, according to the theory of the case now espoused, Schmidt and Wherrity were negligent in failing to allow water to drain from the hose, Schmidt was negligent in failing to hold onto the hose and line and Wherrity was negligent in failing to step on the slack end of the line at the completion of every lift or "stroke." But the "evidence" that the hose and machine were not permitted to drain is entirely absent from plaintiff's testimony, and the attorney's speculation in argument

to the jury (757) is therefore improper, as is his present argument based on testimony of the expert witness Isaac that the circumstances about which plaintiff failed to testify were "possible." This is characteristic of the case. For, after all, Schmidt testified that he did not improperly release the hose and line (403-405), and Wherrity stated that he had absolutely no recollection of the event alleged (Exhibit 7). Moreover, Wherrity's alleged failure to step on the loose end of the line is an obvious contrivance, not for the least because plaintiff himself claimed to the contrary — that Wherrity should have stepped on the taut section of the line — and because such action as urged by the attorney by this absent witness could not, as a matter of simple physics, have prevented the alleged accident. Plaintiff-appellee's case remains based on conjecture and supposition regarding unlikely events as the argument in support of the verdict clearly demonstrates. Moreover, at the time that plaintiff was claiming that the hose, line "and water" weighed 300-500 pounds (172) he was also confronted with his prior deposition testimony where he claimed that the machine alone weighed 250-300 pounds (174). But it weighed only 35-1/2 pounds as the attorney must now agree. This is not by far the sole instance of contradiction and inaccuracy in plaintiff's testimony as a whole.

II

But more importantly the attorney's explanation for some of his own misconduct which is all but admitted (plaintiff-appellee's brief pp. 27-28) is also essentially inaccurate. There was no prior ruling concerning plaintiff's history of gonorrhea. What was discussed in chambers (536-554) was the admissability of plaintiff's history of psychiatric difficulties and the results of certain tests performed contemporaneously, for example, the hematology report of a negative test for syphilis—"VDRL" (E-127). The attorney first claimed that the report was "psychiatric" (545), then "irrelevant" (552). The report *was*

admitted as part of Exhibit J, and far more importantly it was never referred to by the attorney for defendant. What was referred to (632) was the New Orleans Hospital record (plaintiff's Exhibit "I"), offered by plaintiff's attorney, which, unlike the San Francisco records, contains reference to gonorrhea (E-12). The link between plaintiff's gonorrhea ("5 X 6"), his prostate infections and his back pain and pain in his right testicle on June 21, 1971 (E-22, 564) shortly after the alleged accident was what was sought to be explored (631-632). Thus the attorney acted improperly in claiming before the jury a prior ruling on the question of the admissability of evidence of gonorrhea when he knew one was never made. But he later nonetheless suggested in summation (768, 769) that the location of the record he could not find when challenged by the Judge had been withheld by the attorney for the defendant. And even at this juncture, before this court, the attorney seeks to perpetuate the induced confusion between the alleged exclusion of the henatologist's report and plaintiff's "irrelevant prior condition of gonorrhea" which alleged exclusion "covered the very issue that had been previously resolved in chambers" (plaintiff-appellee's brief p. 33). But at 634 plaintiff's attorney referred to an attempt "not more than half an hour ago when Mr. Stearns tried to get the gonorrhea nonsense in, a record showing the gonnorhea thing, and Your Honor ruled at that time that it was not allowed to be put in;" while in the answering brief the outburst in front of the jury is said to be justified by the failure of the Judge to remember "the discussion of exclusion of the venereal disease blood test from the psychiatric record" (plaintiff-appellee's brief, p. 33). But again at 634 the court said "show it to me. Show me any record about *gonorrhea*" (emphasis supplied). Neither at that time nor now can the attorney point to anything in the record supporting his claim that the court had previously ruled that evidence of gonorrhea should be excluded.

III

As plaintiff-appellee's answering brief admits, the record lacks the flavor of the trial court, does not capture the mood of the trial. It does demonstrate, however, expression of intemperance of the grossest sort directed at the trial Judge for which the attorney even now acknowledges no true need to apologize. There are important policy considerations at stake here, principally this Court's responsibility to see to the orderly conduct of trials in the district courts and whether a verdict resulting from misconduct should be allowed to survive.

Respectfully submitted,

WALKER & CORSA
Attorneys for Defendant-Appellant
25 Broad Street
New York, New York 10004

JOSEPH T. STEARNS
Of Counsel.

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Tuckaday & Tuckaday
by Louis C Tucker
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